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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

DUSIAN ALFRED KRIVOSKI, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DUSIAN ALFRED KRIVOSKI, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on October 2, 1956.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A26) has not yet been reported.

JURISDICTION

The opinion of the court below dismissing petitioner's petition in that court (Appendix A, *infra*, pp. A1-A26) was filed on October 2, 1956. Under the practice of the Court of Claims, there is no formal judgment additional

to an opinion dismissing a petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, is applicable to judgments of conviction by court-martial.

2. Whether a conviction by court-martial may be collaterally attacked after the accused's release from confinement, by way of a suit for back pay in the Court of Claims, where the accused makes a showing that he was deprived of substantial rights under the Fifth and Sixth Amendments in the court-martial proceedings.

3. Whether an accused is deprived of the effective assistance of counsel in violation of the Sixth Amendment where he is assigned counsel who is infected with a prior loyalty to a conflicting interest that counsel does not disclose and that the accused does not waive, and where counsel's representation of the accused is in consequence perfunctory and inadequate.

4. Whether an accused is denied due process of law in violation of the Fifth Amendment, where his appellate counsel is denied access, in the course of appellate proceedings subsequent to conviction, to the opinions that are then under review in those proceedings.[1]

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[1] In the event that certiorari is granted, petitioner reserves the right to argue that there was a failure on the part of the Court of Claims to make any findings of fact on certain material issues; that portions of that court's ultimate findings 18 and 21 are not sustained by its findings of evidentiary or primary facts; and that its finding 30 is utterly without any support in the evidence. For the present authority of this Court with respect to the review of facts found by the Court of Claims, see *United States* v. *Penn Mfg. Co.*, 337 U.S. 198, 207-208, note 4.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent constitutional provisions, statutes, and regulations involved in this case are set forth in Appendix B, *infra* pp. A27-A36.

STATEMENT

The facts are set forth in detail in the Court of Claims' findings, *infra* pp. A10-A26. For purposes of the present petition, they may be stated in somewhat less detail as follows:

A. Petitioner, Finley, and the Certificate Transactions

After creditable enlisted and commissioned service in World War II, petitioner was duly separated from active duty, and in 1947 was promoted to the grade of Captain, Finance Department Reserve. In February 1948, he re-enlisted in the Army, and in August 1948 he was recalled to active duty as a First Lieutenant, Finance Department, Army of the United States. (Fdg. 2, p. A10.)

In August 1950, petitioner was on duty as deputy disbursing officer at the Army Finance Center, Friedberg, Germany. The Finance Detachment there was commanded by Captain Willard E. Finley. The commanding officer and central disbursing officer at the Finance Center was Colonel Samuel J. Taggart. (Fdg. 3, p. A10.)

As deputy disbursing officer, petitioner had full and untrammeled access to the vault, and keys to all parts thereof here material. The vault had a corridor and four rooms. Three of these were reached from the corridor, while the fourth was an annex accessible only from one of the corridor rooms. (Fdg. 3, pp. A10-A11.)

At this time, military and civilian personnel of the U. S. Army in Germany were paid only in military payment certificates, which were periodically withdrawn from

circulation, counted, and then destroyed. Such a periodic destruction was scheduled for August 3, 1950. (Fdg. 4, p. A11.)

A committee of three officers, including Captain Finley, was appointed, and on that date met the petitioner and went with him into the vault to count the certificates. The certificates were in the annex room, from which they were taken into the adjoining corridor where the committee worked. When all the certificates were counted, they were placed in footlockers in the annex room. The committee and the petitioner then went to lunch, and the certificates were destroyed in the afternoon. (Fdg. 5, p. A11.)

For some months prior to August 1950, Captain Finley had on numerous occasions suggested to the petitioner that the latter should take a bundle of these certificates for their own use from the mutilated currency that was periodically destroyed, and on August 3, 1950, Finley twice repeated the suggestion, once before and once after lunch. (Fdg. 6, p. A11.)

Before the committee reconvened, petitioner returned to the annex room of the vault, took a bundle of certificates with a face value of $9,990 out of a footlocker, placed that bundle in a metal cashier's box in the corridor room of the vault, and went out to witness the burning. (Fdg. 6, p. A12.)

Later that afternoon Colonel Taggart had occasion to go into the corridor room of the vault, noticed the cashier's box therein, brought it upstairs and opened it, and found the certificates inside. Petitioner had meanwhile become apprehensive about his actions, and, when he heard that Colonel Taggart had brought the box up, sought him out and told him everything he had done. This was the first inkling Colonel Taggart had had of the facts, as there were several innocent explanations for the presence of the certificates in the cashier's box. (Fdg. 6, p. A12.)

B. The Participants' Stories and the Charges Against Them

That afternoon and again on the following morning, Colonel Taggart talked both to the petitioner and to Finley.

Petitioner said it was Finley who had originally suggested that he take some of the certificates on the occasions of the periodic destructions, that the proceeds be divided between them, and that this suggestion had been frequently repeated, the last time at noon of August 3, 1950.

Finley told Colonel Taggart that he had been wrongfully accused by the petitioner. He also said that he was afraid the petitioner would take the certificates, and that he was afraid that, if Colonel Taggart had not found the certificates, petitioner would not have divided with him. (Fdg. 7, p. A12.)

On August 4, petitioner was barred from further access to the vault and was directed to surrender his keys. On August 7, both he and Finley were placed in arrest in their respective quarters in Friedberg. On the same day, after being warned of his rights and read AW 24, *infra*, p. A29,[2] petitioner made a full and complete written statement to agents of the Army's Criminal Investigation Division incriminating himself and implicating Finley, substantially as he had previously related the facts to Colonel Taggart. (Fdg. 8, pp. A12-A13.)

On August 11, Colonel Taggart preferred charges against both the petitioner and Finley.

Charge I against the petitioner alleged a violation of AW 96, *infra*, p. A33, consisting of conspiring with Finley to steal a package of military payment certificates in the amount of $9,990.

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[2] As in the Court of Claims' findings, all references to the Articles of War in this petition are to those in effect during 1950 and through May 30, 1951, viz., those enacted by the Act of June 4, 1920, as amended by Title II of the Act of June 24, 1948 (10 U. S. C. [Supp. II to 1946 ed.] §§ 1471-1593).

Charge II against the petitioner alleged a violation of AW 93, *infra*, p. A32, consisting of stealing $9,990 worth of military payment certificates in conjunction with Finley.

Charges I and II against Finley alleged violations of AW 94 and AW 95, not relevant here.

Charge III against Finley alleged a violation of AW 96, *infra*, p. A33, consisting of conspiring with the petitioner to steal a package of military payment certificates in the amount of $9,990.

Charge IV against Finley alleged a violation of AW 93, *infra*, p. A32, consisting of stealing $9,990 worth of military payment certificates in conjunction with the petitioner.

The charges against the petitioner and Charges III and IV against Finley involved the identical package of military payment certificates. (Fdg. 9, pp. A13-A14.)

C. Events Prior to Finley's Trial

On August 18, 1950, the charges against Finley were investigated as required by AW 46(b) and par. 35*a*, MCM.[3] Thereafter, the charges and the allied papers were referred for advice to the Staff Judge Advocate, pursuant to AW 47(b) and par. 35*b*, MCM. That officer, Lt. Col. Weisler,[4] on August 29, 1950, recommended that the charges against Finley be referred for trial to a general court-martial, and on that day they were so referred by the Commanding Officer, Frankfurt Military Post, to a general court-martial appointed by him. Lt. Col. Weisler contemplated that

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[3] As in the findings of the Court of Claims, all references to the Manual for Courts-Martial in this petition are to the *Manual for Courts-Martial, U. S. Army, 1949*, (Ex. Order 10020, 13 Fed. Reg. 7519), which was in force during 1950 and through May 30, 1951.

[4] Similarly following the pattern of the Court of Claims' findings, all references to military personnel in this petition indicate the rank held by such personnel at the time referred to.

the prosecution would use the petitioner as a witness against Finley, and so indicated in his letter of advice. (Fdg. 10, p. A15.)

The trial judge advocate of the court-martial to which charges against Finley were referred was Major James E. Atkins, Jr., since deceased, and the appointed military defense counsel was Captain Roy H. Adams. Finley was principally defended, however, by Milton J. Teiger, Esq., a civilian lawyer, also since deceased, as individual counsel selected by the accused. (Fdg. 11, pp. A15-A16.)

The charges against petitioner had, at this time, been neither formally investigated nor referred for trial. They were held in abeyance on orders of the Commanding Officer, Frankfurt Military Post, and were not served upon him. Petitioner was still in arrest in quarters, and had not been told whether he would or would not be tried. (Fdg. 12, p. A16.)

Early in September, while in such arrest, petitioner was visited by Captain Adams, who as the regularly appointed defense counsel for Finley was interviewing all witnesses in the Finley case. Adams told petitioner that, under AW 24, *infra*, A29, he was not required to incriminate himself in any testimony he might give at Finley's trial. None the less, petitioner still believed he had no other choice in the matter that would meet the compulsion of his conscience, and told Adams he would testify. (Fdg. 12, p. A16.)

D. Finley's Trial

At Finley's trial, both Teiger and Adams were present to represent Finley. All three cooperated in presenting Finley's defense. At trial they functioned as a team with mutual respect for each other, with Teiger assuming the active role as defense counsel. Adams was prepared to assume Finley's defense in the event Teiger were to with-

draw or could not be present. Adams represented Finley with undivided loyalty. (Fdg. 13, pp. A16-A17.)

Prior to Finley's trial, a *nolle prosequi* had been entered as to Charge II. He was arraigned on the remaining charges and specifications and, through Teiger, pleaded not guilty to all of them. Petitioner was the principal witness against Finley as to Charges II and IV, and, except as to some admissions by Finley testified to by Colonel Taggart, was the only witness directly connecting Finley with the military payment certificate transactions alleged in Charges III and IV. Petitioner did not claim his privilege against self-incrimination in respect of his testimony as to those transactions, although he was reminded of his rights. (Fdg. 14, p. A17.)

The matters set forth above, pp. 3-5,[5] were presented in detail. At the close of the prosecution's evidence, Teiger moved for findings of not guilty as to Charge IV, pursuant to MCM, ¶72*a*, essentially because petitioner "is confessing to a crime he never committed." Adams heard this motion argued; it was denied. Finley did not testify as to the transactions alleged in Charges III and IV. (Fdg. 14, p. A17.)

At the close of all the testimony, the court-martial found Finley guilty of all charges and specifications, and sentenced him to dismissal, total forfeitures, and five years' confinement. (Fdg. 14, p. A17.)

E. Events After Finley's Trial and Prior to Petitioner's

Later on the same day that the Finley court-martial adjourned, the charges against petitioner were referred for pretrial investigation pursuant to AW 46(b) and MCM ¶35*a*, and the investigation took place on October 6, 1950. Adams, who had previously represented Finley, appeared

[5] Specifically, the matters set forth in Fdgs. 3-7, pp. A10-A12; see Fdg. 14, p. A17.

at the pretrial investigation as counsel for the petitioner, and without objection from the petitioner, represented him there; pursuant to Adams' advice, petitioner made no statement at the investigation. (Fdg. 15, pp. A17-A18.)

At the conclusion of the pretrial investigation, petitioner requested Major Gaddis, on duty in Austria, as his defense counsel for the trial, but Adams, upon being told that Gaddis was not a lawyer, said that he was not available to act (Def. Ex. 8).[6] "No definite appointment of defense counsel was made by [petitioner] at this time, and it was tacitly understood that Captain Adams would protect the [petitioner's] interests until the question of defense counsel could be resolved. It was optional in [petitioner's] mind whether he was defended by Adams or some other person. He expressed no preference, gave no serious thought to the matter, had no conscious dissent to being represented by Adams, and expected Adams to represent him." (Fdg. 15, p. A18.)

On recommendation of Lt. Col. Weisler, the staff judge advocate, to whom the charges against petitioner and the allied papers were referred, Charge I was stricken, and Charge II was referred for trial on October 11, 1950, to a general court-martial appointed by the Commanding Officer, Frankfurt Military Post. On the next day, a copy of the charges was served on the petitioner. (Fdg. 16, pp. A18-A19.)

On Weisler's recommendation, the remaining charge against the petitioner was referred to a court composed of members other than those who had heard the Finley case, because Weisler considered such prior connection disqualifying. A different law member was also appointed. Major Atkins and Captain Adams were reappointed trial

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[6] In this instance, petitioner contends that the court below failed to make a finding on a material fact resting on an exhibit introduced by the United States without any limitation.

judge advocate and defense counsel, respectively. Weisler was familiar with the facts involving the petitioner and Finley as they were reflected in the papers accompanying the Finley charges [see pp. 6-7, *supra*], but he did not consider that Adams, who had been regularly appointed defense counsel in many cases at Frankfurt Military Post, was disqualified by any conflict of interest from representing the petitioner. Weisler made no effort to recommend the appointment as defense counsel of any officer not connected with the Finley case because the existence of a possible conflict of interest did not occur to him. (Fdg. 16, p. A19.)

Petitioner had been in arrest in quarters since August 7, 1950. Until attending the pretrial conference on October 6, he had not been told that any charges against himself had been sworn to, or that he would be tried. Between those dates petitioner made no effort to obtain counsel, and the staff judge advocate's office had not provided him with counsel before October 6. (Fdg. 17, p. A19.)

The terms of petitioner's arrest in quarters were set forth in a written communication, since lost (Fdg. 17, p. A20). But petitioner believed that, while in such status, he was forbidden to see or communicate with anyone or even to use the telephone; and Army Regulations then in force provided that "A person in arrest * * * will make requests of every nature in writing, unless otherwise authorized." (Tr. 136, 289; ¶7*c*, AR 600-320, 22 April, 1949).[7]

On October 6 petitioner discussed with Adams the question of retaining civilian counsel. Adams advised against it because civilian counsel might antagonize the

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[7] Here again, petitioner asks for a material finding on uncontradicted evidence. ("Tr." refers to the transcript of testimony in the Court of Claims.)

court-martial, as had occurred in the Finley trial. (Fdg. 18, p. A20.)[8]

In all, petitioner had three conferences with Captain Adams after the pretrial investigation and before the trial. (Fdg. 18, p. A20.)

The first, in Adams' car driving from Frankfurt back to Friedberg after the pretrial investigation, consisted of generalizations. (Fdg. 18, p. A20.)

The second, on October 16, lasted about three hours, and involved discussion of the elements of the offense, whether they could be proved, and how to plead; decision on the latter point was left open. "The [petitioner] indicated he would be bound by Captain Adams' advice. Although lacking a professional appreciation of the legal requirements to prove the crime charged, [petitioner] clearly thought he had committed an offense of some description. He was mentally reconciled to a dismissal from the service as a punishment and at that time was concerned primarily with avoiding imprisonment. He depended on the advice of counsel to select the alternative that would best serve the desired result." (Fdg. 18, p. A20.)

Prior to the trial, Adams had discussed with Weisler the question of clemency if the petitioner pleaded guilty; Weisler said he could hold out no assurances as it was the policy of the reviewing authority not to make any deals. (Fdg. 19, p. A21.)

Prior to the trial, likewise, Adams had considered but rejected the possibility of entering on petitioner's behalf a plea of guilty to the lesser included offense of an attempt

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[8] The court below found that "This advice was an exercise of Captain Adams' best judgment and there is no showing that it was not motivated in the best interests of the [petitioner] or was not sound under the circumstances prevailing." It is petitioner's view that this is an ultimate finding that is not sustained by the Court of Claims' findings of evidentiary facts.

in violation of AW 96, *infra*, p. A33; "Adams had discussed this with [petitioner], who was content to rest on the judgment of his counsel." (Fdg. 19, p. A21.)

F. Petitioner's Trial

Petitioner's trial took place on October 19. Adams appeared as petitioner's counsel and was accepted by him as such. There were no challenges by either side. Adams pleaded petitioner guilty, the law member explained the meaning of the plea, and petitioner persisted therein. (Fdg. 20, p. A21.)

The prosecution called four witnesses, including Colonel Taggart, and introduced the statement petitioner had given the CID on August 7 (*supra*, p. 5). The defense called three officers and two enlisted men as character witnesses. Petitioner took the stand to testify to his personal and military background, but was not asked any questions to elicit what he had told Colonel Taggart, the CID, and the Finley court-martial, viz., that Finley had repeatedly importuned him to take the certificates. (Fdg. 20, pp. A21-A22.)

Petitioner was found guilty, and was sentenced to dismissal, total forfeitures, and two years' confinement (Fdg. 20, p. A22). The entire trial, from beginning to end, had lasted just one hour and ten minutes.[9]

"If, in legal contemplation, a conflict of interest existed between the positions of Captain Finley and the [petitioner] so as to disqualify Captain Adams to represent the [petitioner] after previously representing Captain Finley, this conflict did not occur to Captain Adams or to the staff judge advocate or to [petitioner], was not explained by Captain Adams or the staff judge advocate to [petitioner, and] did not cause Captain Adams

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[9] It began at 1:10 P.M. and adjourned at 2:20 P.M. Pl. Ex. 1, pp. 2, 41.

or the staff judge advocate to explain to [petitioner] specifically that he had rights to the assistance of counsel untainted by prior loyalties to a conflicting interest." (Fdg. 21, p. A22.)[10]

G. Events Following Both Trials

On October 24, 1950, Weisler recommended, pursuant to AW 47(c) and MCM, ¶87*b*, that the findings and sentence in petitioner's case be approved, and that the term of confinement be not mitigated, notwithstanding that "Without the testimony and cooperation of the accused a conviction could not have been obtained in the case of Captain FINLEY." Petitioner's sentence was accordingly approved in its entirety by the Commanding Officer, Frankfurt Military Post, on the same day. (Fdg. 22, pp. A22-A23.)

On the next day, Adams submitted a clemency letter on petitioner's behalf recommending that the portion of the sentence extending to confinement be suspended. Adams made six points, including the argument that the Government suffered no loss. The matters set forth in the clemency letter were not presented to the court-martial after it found petitioner guilty and before it sentenced him, and the letter itself was submitted too late for consideration by the reviewing authority, who had already acted on petitioner's record of trial the day before. (Fdg. 23, p. A23.)

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[10] The court below went on to find that "It is reasonable to conclude that Captain Adams' defense of [petitioner] would have been the same as that which actually transpired even if he had not previously represented Captain Finley." In petitioner's view, this is either an ultimate finding completely contrary to the findings of primary fact, or else, in view of *Glasser* v. *United States*, 315 U.S. 60, 76, it is a conclusion of law as to the effect of conflicting loyalties on the effectiveness or otherwise of representation by counsel.

On October 30, Weisler completed his review of Finley's record of trial. He held it legally sufficient, and, with respect to sentence, advised the reviewing authority that "It is believed that the 5 years confinement imposed in this case appears to be somewhat disproportionate to the sentence imposed in the KRIVOSKI case inasmuch as the two officers involved are equally involved in the offenses charged against them of which they have been found guilty." However, in view of the additional offenses in the Finley case, Weisler recommended a somewhat more severe sentence for Finley, of three years' confinement, and the reviewing authority on the next day reduced Finley's sentence accordingly. (Fdg. 24, pp. A23-A24.)

H. Appellate Proceedings in Both Cases

Petitioner and Finley were sent to Governors Island, New York, and their respective records of trial reached the Office of The Judge Advocate General of the Army. Finley retained Thomas H. King, Esq., as appellate counsel. Petitioner also sought to retain Mr. King and sent him a copy of his record of trial and a retainer. (Fdg. 25, p. A24.)

Mr. King declined petitioner's representation because of his apprehension of a possible conflict of interest between petitioner's case and Finley's, essentially because petitioner implicated Finley and the latter denied having importuned petitioner. Mr. King accordingly transmitted petitioner's record of trial and the full remittance—of $1,000 (Tr. 313, 329)—to petitioner's present counsel, without any deduction or forwarding fee. (Fdg. 25, pp. A24-A25.)

"This was the first intimation [petitioner] had from any source that Captain Adams' representation of both Captain Finley and the [petitioner] involved a possible conflict of interest." (Fdg. 25, p. A25.)

After Finley's conviction had been affirmed by the Board of Review, with modifications not relevant here, affidavits were received from Finley and Teiger challenging the fairness of the trial. Finley's affidavits impugned Adams' loyalty, alleging *inter alia* that Adams had been too friendly with the trial judge advocate. Adams submitted a counter-affidavit in which he set forth under oath the details of his representation of and complete loyalty to Finley. (Pl. Ex. 7, pencilled pp. 42-45, 13-17; 12 BR-JC 127.)

The Judicial Council held that the trial was fair and that Adams had not been disloyal to Finley; affirmed the findings of guilty as to Charge I as modified by the Board of Review; affirmed the finding of guilty as to Charge IV, on the ground that Finley had counseled petitioner to take the certificates; disapproved the finding of guilty as to Charge III, holding that no conspiracy was shown to exist; and recommended that the sentence as to confinement be reduced to two years. The Judge Advocate General concurred and reduced the sentence accordingly. Finley was in consequence dismissed from the Army, and in time completed service of his sentence. (12 BR-JC 127, 145, 158; GCMO 34, Dept. of the Army, 1951; Tr. 319.)[11]

Petitioner's present counsel argued and briefed petitioner's case before the Board of Review, which affirmed the conviction.

Thereafter, petitioner's counsel wrote The Judge Advocate General requesting that he be furnished with the review made by the staff judge advocate and the opinion of the Board of Review, which documents were wanted in order to prepare a presentation to the Judicial

[11] The matters set forth in this paragraph and the one immediately preceding it are drawn from the references cited; in this instance also the court below failed to make findings as to material facts.

Council before which the case was then pending. The Judge Advocate General denied the request. (Fdg. 26, p. A25.)

The opinion of the Board of Review that was requested has since been reported, has never been classified, and copies of the volume in which it now appears are on open shelves. The review of the staff judge advocate requested has never been classified, was first made available to petitioner's counsel at the hearing before the Commissioner in October 1954, and was admitted as a plaintiff's exhibit. The review of the staff judge advocate in Finley's case is similarly unclassified, was included in the Finley record of trial that was produced in response to a call, and is also an exhibit in this case. (Fdg. 27, p. A25.)

Petitioner's case was argued and briefed before the Judicial Council, which affirmed petitioner's conviction but recommended that the confinement be reduced to one year; The Judge Advocate General concurred and reduced the confinement accordingly. Petitioner's dismissal was announced in Department of the Army General Court-Martial Orders as effective from midnight, March 30, 1951. He remained in confinement until July 2, 1951, at which time he was released on a parole that expired August 18, 1951. (Fdg. 28, p. A26.)

A petition for new trial pursuant to AW 53, *infra*, p. A32, as reenacted, was filed on petitioner's behalf on October 2, 1951, was orally argued, and was denied by The Judge Advocate General on January 2, 1952. (Fdg. 29, p. A26.)

Some—but not all—of the foregoing facts were presented to the military authorities reviewing petitioner's successive applications. The following matters were not presented: the determination to hold the charges against petitioner in abeyance (Fdg. 12, p. A16); the interview between petitioner and Captain Adams in the latter's capacity as

Captain Finley's counsel (Fdg. 12, p. A16); the views of Lieutenant Colonel Weisler as to disqualifications and conflict of interests (Fdg. 16, p. A19); the discussion between Captain Adams and the petitioner with reference to retaining civilian counsel (Fdg. 18, p. A20); the extent to which petitioner depended on Captain Adams' advice (Fdgs. 18 and 19, pp. A20-A21); the fact that Captain Adams had given actual consideration to pleading petitioner guilty to a lesser included offense (Fdg. 19, p. A21); the failure of both Captain Adams and Lieutenant Colonel Weisler to explain or disclose conflict of interest to the petitioner (Fdg. 21, p. A22); the fact that Captain Adams' clemency letter was submitted too late (Fdg. 23, p. A23); Mr. King's refusal of petitioner's appellate representation because of possible conflict of interest with Mr. King's prior retainer by Captain Finley (Fdg. 25, pp. A24-A25); and the fact that Mr. King's refusal to represent petitioner in the appellate proceedings was the first intimation petitioner had had from any source as to the conflict of interest involved in Captain Adams' dual representation (Fdg. 25, p. A25). The excepted matters were not presented to the military authorities at any time, and were first brought to light at the hearings before the Commissioner in the Court of Claims.[12]

I. The Present Proceeding

Following his release from confinement, petitioner brought the present suit in the Court of Claims, on the

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[12] The foregoing paragraph is based entirely on documentary evidence, viz., the several exhibits covering the successive stages of petitioner's trial and its sequelae (Pl. Ex. 1-4, 8, 10-12; Def. Ex. 5, 7-11) and Finley's record of trial (Pl. Ex. 7). It was stipulated at the trial (Tr. 200-201) that the complete military records had been introduced into evidence. This indisputable documentary proof makes it clear that Court of Claims' finding 30 (p. A26), that "The facts presented in this report were available and presented to the military authorities reviewing [petitioner's] successive applications," is completely without the support of substantial evidence.

footing that the court-martial and the appellate proceeding subsequent thereto, pursuant to which he was purportedly dismissed from the Army, were null and void, not because jurisdictionally void *ab initio*, but because the court-martial lost jurisdiction for two reasons (Petition, ¶¶ 4, 14, 15, 17):

First, because petitioner was deprived of the effective assistance of counsel at his trial by court-martial, essentially because, without effective waiver on his part, he was assigned as his counsel an officer who had represented a prior conflicting interest, in consequence of which his representation by such counsel was perfunctory and inadequate.

Second, because petitioner was denied due process of law in the conduct of the appellate proceedings that followed his trial by court-martial, inasmuch as his appellate counsel was denied access during the pendency of those proceedings to the opinions that were under review.

Petitioner accordingly sought as recovery the difference between the pay and allowances that he would have earned had he been continued on duty after the date of his purported dismissal, less a reduction, by way of "just credit and off-set" (*Borak* v. *United States*, 110 C. Cls. 236, 248, certiorari denied, 335 U.S. 821) in the amount of any sums earned by petitioner in private employment (see Fdg. 31, p. A26).

The Court of Claims dismissed the petition and denied review, essentially because it believed itself precluded by *Burns* v. *Wilson*, 346 U.S. 137, and *Hiatt* v. *Brown*, 339 U.S. 103, from reviewing the court-martial proceedings (Appendix A at pp. A8-A9). There is a suggestion in the opinion below (p. A8) that petitioner waived Captain Adams' disqualification, and an apparent holding (p. A9) that what was done was not so flagrant as to deprive the

court-martial of jurisdiction once it had been regularly constituted.

REASONS FOR GRANTING THE WRIT

This petition presents the question, not heretofore decided by this Court, whether the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, to the effect that a court otherwise competent may lose jurisdiction if in the course of a trial it deprives an accused of constitutional protections, is applicable to a judgment of conviction by court-martial. That doctrine, never questioned here in nearly twenty years in respect of collateral review of convictions by state and federal civil courts, has been ratified and accepted by Congress. See the first paragraph of 28 U.S.C. § 2255. Whether that principle is also applicable to judgments of courts-martial was neither argued nor decided in *Hiatt* v. *Brown*, 339 U.S. 103, and was not determined with the weight of precedent in *Burns* v. *Wilson*, 346 U.S. 137, inasmuch as in the latter case there was no opinion of the Court. The question is one of continuing importance under the Uniform Code of Military Justice, which contains the same "finality" provision found in the Articles of War under which petitioner was convicted, compare Art. 76, UCMJ, with AW 50(h) of 1948, *infra*, pp. A31, A33, and which changed the military appellate structure only by substituting a Court of Military Appeals for the Judicial Council established under the 1948 Articles of War.

First. About ten years ago, the Court of Claims expressly and specifically held that the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, justified the setting aside of a conviction adjudged by an otherwise regularly constituted court-martial, where the accused had been deprived of substantial rights under the Sixth Amendment. *Shapiro* v. *United States*, 107 C. Cls. 650, 654-655. The Government then did not contest that ruling further,

and promptly stipulated the amount of the judgment due thereunder. 108 C. Cls. 754. Now, however, the Court of Claims apparently feels itself precluded by *Hiatt* v. *Brown*, 339 U.S. 103, and *Burns* v. *Wilson*, 346 U.S. 137, from following the rationale of its earlier ruling in the *Shapiro* case.

Those decisions, however, did not decide the present issue. Neither party in *Hiatt* v. *Brown* cited or argued *Johnson* v. *Zerbst* (No. 359, Oct. T. 1949; see 346 U.S. at 848) and the Court's opinion does not discuss the problem. *Hiatt* v. *Brown*, therefore, cannot be an authority for a proposition that was neither decided nor presented for decision. "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511.

And, although the issue was raised in *Burns* v. *Wilson*, 346 U.S. 137, see separate opinion on denial of rehearing, 346 U.S. 844-851, there was no opinion of the Court in that case, see 346 U.S. at 138, inasmuch as five of the nine Justices participating did not concur as to the ground of decision. Accordingly, under this Court's well settled rule (*United States* v. *Pink*, 315 U.S. 203, 216; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214), the decision in *Burns* v. *Wilson* is not a precedent; "the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases."

The basic question presented by this petition is therefore not foreclosed by any decision here.

If the ruling below is permitted to stand, then questions which may be raised on collateral attack of either a judgment of conviction adjudged by a constitutional court

of the United States (e.g., *Johnson* v. *Zerbst*, 304 U.S. 458) or of one entered by a state court of general criminal jurisdiction after appeal to and affirmance by the highest court of the state (e.g., *Leyra* v. *Denno*, 347 U.S. 556), are not open to judicial scrutiny when the judgment of conviction under collateral attack is that of a court-martial, which is an executive agency, which has only a limited jurisdiction, and which is constituted only for the particular case. In Winthrop's words (*Military Law and Precedents* [2d ed. 1896] *54 [1920 reprint, pp. 49-50]), "As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action. It is not, in a legal sense, a 'court of record' * * *." Yet under the ruling below, a conviction by such an *ad hoc* executive tribunal is immune from further scrutiny even though that conviction violated constitutional guarantees, while a similar conviction by a state or federal court of general jurisdiction must meet and withstand searching judicial inquiry when assailed as involving a similar infirmity.

Petitioner cannot believe that this either is or should be the law. As is pointed out below, he made a substantial showing that the military authorities deprived him of critical constitutional protections. He should have the right to have his contentions as to those matters tested by the same standards as if he had made and proved similar allegations concerning a conviction in a civil court, state or federal.

Second. The question is one of obvious and continuing public importance, notwithstanding the supersession of the 1948 Articles of War by the Uniform Code of Military Justice. Nothing turns on the differences effected by the Code. Thus, Art. 76, UCMJ, *infra*, p. A33, has the

same "finality" provision that was in AW 50(h) of 1948, *infra*, p. A31; it is petitioner's contention that AW 50(h) does not bar collateral review,[1] but neither his contentions nor this Court's ultimate decision would be any different if the case turned on Art. 76 of the Uniform Code.

Moreover, while the Code created a Court of Military Appeals to review decisions of Boards of Review, that tribunal represented essentially a substitution for the Judicial Council which had had similar functions under the 1948 Articles of War. In each instance, the present question as to the scope of collateral attack is identical —and still open. The scope of military jurisdiction today, when millions of citizens are under arms, emphasizes the necessity for an authoritative adjudication as to whether military judgments are entitled to greater immunity than those of civil courts, state and federal.

Third. The heart of petitioner's first substantive contention is that at and before his trial he was denied the effective assistance of counsel in violation of the Sixth Amendment, because, without understanding waiver, he was furnished with counsel who had previously represented a conflicting interest with undivided loyalty, and whose defense of petitioner was in consequence perfunctory and inadequate.

1. Adams represented both Finley and the petitioner despite the existence of a plain, sharp, and irreconcilable conflict between them.

Petitioner and Finley were separately charged with the joint commission of two offenses, first, of taking the military payment certificates, and second, of conspiring

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[1] Inasmuch as the executive did not respect the "finality" of AW 50(h), see 41 Op. Atty. Gen. No. 8, there is no reason why courts should be bound by its provisions. See 346 U.S. at 849-850.

to take them (Fdg. 9, pp. A13-A14).[2] Only petitioner actually had his hands on the certificates. Finley's guilt of the taking rested on the circumstance that he importuned, advised, and counseled petitioner to do what he did, and it was only on this footing that his guilt of the substantive offense was ultimately sustained (12 BR-JC 145, 158). Finley's guilt was proved almost exclusively by petitioner's testimony as to what Finley had said (Fdg. 14, p. A17). But Finley's position, from the outset to the bitter end, was that he had been wrongly accused, and that he had not importuned petitioner (Fdgs. 7, 25, pp. A12, A25).

On those undisputed facts, it is plain that counsel for Finley was required to deny what counsel for petitioner was in duty bound to assert. It was for this reason that Mr. King, who had been retained as appellate counsel for Finley, declined the subsequent proffer of appellate representation from petitioner (Fdg. 25, pp. A24-A25). Inescapably, therefore, there was a conflict of interest in the sense of the 6th Canon of Professional Ethics, viz., "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." And, as *Glasser* v. *United States*, 315 U.S. 60, shows, representation by a lawyer with conflicting loyalties so taints a conviction that it cannot stand.

The holding below is contrary not only to *Glasser*, but to consistent rulings in other federal courts setting aside convictions because the conflict of interest on the part of defending counsel was such as to deprive the accused of the effective assistance of counsel. *Craig* v. *United States*,

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[2] The conspiracy allegation against petitioner was stricken before his trial (Fdg. 16, p. A19). The same allegation against Finley was ultimately disapproved by the Judicial Council for failure of proof (12 BR-JC 145).

217 F. 2d 355 (C. A. 6); *Butzman* v. *United States*, 205 F. 2d 343 (C. A. 6); *Taylor* v. *United States*, 226 F. 2d 337 (D. C. Cir.), reversing 126 F. Supp. 764 (D. D. C.); *Scott* v. *District of Columbia*, 99 A. 2d 641 (D. C. Mun. App.), affirmed, 214 F. 2d 860 (D. C. Cir.); see *Tucker* v. *United States*, 235 F. 2d 238 (C. A. 9).

Indeed, the federal courts have been so zealous to prevent violations of the 6th Canon that, in appropriate cases, orders have been entered disqualifying attorneys from representing the client who retained them when it was shown that they had previously represented another client who had a conflicting interest. *Laskey Bros.* v. *Warner Bros. Pictures*, 224 F. 2d 824 (C. A. 2), certiorari denied, 350 U. S. 932; *Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920 (C. A. 2); *Fisher Studio* v. *Loew's Inc.*, 232 F. 2d 199, certiorari denied, 352 U. S. 836.

2. The circumstance that counsel is appointed and salaried rather than individually retained and compensated does not relieve him from the disqualification that arises out of the prior representation of a conflicting interest. *Craig* v. *United States*, 217 F. 2d 355, 359 (C. A. 6); *Merrick* v. *American Security & Trust Co.*, 107 F. 2d 271, 278 (D. C. Cir.), certiorari denied, 308 U.S. 625.[3] Indeed, the Supreme Court of Illinois, which recently set aside a conviction on collateral attack because of the incompetence of the public defender, there decided that a court-appointed lawyer is to be held to a higher standard of competence than one who is selected and retained by the defendant himself. *People* v. *Morris*, 3 Ill. 2d 437, 445, 452-453, 121 N.E. 2d 810, 815, 819.

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[3] No civil decision of which petitioner is aware supports the reasoning of the Board of Review in this case (12 BR-JC 81, 85), that "Military counsel, in any event, from the nature of their office which precludes any financial gain for their defense of an accused person, are free from imputations of disloyalty which may attach to counsel for hire in similar circumstances."

3. Adams' representation of petitioner was perfunctory and inadequate. To summarize very briefly—

(i) After three conferences with petitioner, in a case with whose facts Adams was thoroughly familiar, he did not even make his final decision how to plead petitioner until they were walking into the courtroom on the day of the trial (Fdg. 19, p. A21). Plainly, *pro forma* representation does not satisfy the constitutional requirement. *Powell* v. *Alabama*, 287 U.S. 45, 58.

(ii) Adams had one point of law and one point of fact to present, and presented neither.

The only—and obvious—point of law was that, since the certificates never left the vault, petitioner was guilty only of an attempt in violation of AW 96, *infra* p. A33; see MCM, ¶183*c*. Under military practice, Adams could have pleaded petitioner guilty to the lesser included offense. MCM, ¶¶71, 78*b*, 78*c*. Adams was aware of the precise point (Fdgs. 14, 19, pp. A17, A21), which under the authorities was more than simply "arguable."[4]

The only—and obvious—point of fact to be presented was the mitigating circumstance that petitioner had been repeatedly importuned by a senior officer to do what he eventually did (Fdg. 6, p. A11). This was never brought out through petitioner's own lips (Fdg. 20, pp. A21-A22), and Adams himself admitted that having it called to the court's attention only through the reading of petitioner's CID statement (*ibid.*) was not the best way of presenting it (Tr. 283).

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[4] *People* v. *Barnes*, 158 App. Div. 712, 143 N.Y. Supp. 885, appeal dismissed, 210 N.Y. 612, 104 N.E. 1136; *Chaplin* v. *Lee*, 18 Neb. 440; *McAleer* v. *State*, 46 Neb. 116, 64 N.W. 358.

Note that, in *Gibbs* v. *Burke*, 337 U.S. 773, 782, where "questionable issues [were] allowed to pass unnoticed" in a felony case where the defendant was not offered counsel, this Court held that he did not have a trial "that measures up to the test of fairness prescribed by the Fourteenth Amendment."

(iii) Petitioner's plea of guilty left the sentence as the only issue. This was a discretionary matter with the court (MCM, ¶80a, and p. 137) to be based on matter in mitigation presented to it (*id.*, ¶79). Adams knew petitioner was concerned primarily with avoiding imprisonment (Fdg. 18, p. A20), and he was himself aware of at least six mitigating factors (Fdg. 23, p. A23), a number of which had occurred to him before the trial (Tr. 278-280, 282). None were presented to the court-martial (Fdg. 23, p. A23). Similar nonfeasance in a federal court would have resulted in a remand for resentencing. *Gadsden* v. *United States*, 223 F. 2d 627 (D. C. Cir.).

(iv) Adams' final lapse was delaying his clemency letter so that it was not available for consideration by the reviewing authority (Fdg. 23, p. 23A).

4. Adams' utterly incompetent defense of petitioner was a direct consequence of his prior and continuing loyalty to the adverse interest of Finley. That loyalty first came to light when, as Finley's counsel, Adams attempted—very properly—to prevent petitioner from testifying against his client (Fdg. 12, p. A16). That loyalty persisted in Adams' representation of Finley at the latter's trial (Fdg. 13 at p. A17). That loyalty is apparent from every paragraph of the post-trial affidavit submitted by Adams in the Finley case after his own loyalty to Finley had been questioned, three months after the conclusion of petitioner's trial (Pl. Ex. 7, pencilled pp. 13-17; *supra*, p. 15). That loyalty was testified to by Adams here (Tr. 264). And that prior, continuing, and overriding loyalty is the only explanation for Adams' sorry performance in petitioner's case, which once again proves the truth of the timeless precept that "No man can serve two masters: for * * * he will hold to the one and despise the other." Holding to Finley, Adams could not but despise petitioner, whose testimony had so effectively sealed Finley's fate.

5. There is no foundation for the intimation of waiver in the opinion below (p. A8). The existence of a disqualifying conflict of interest did not occur to Weisler nor to Adams (Fdgs. 16, 21, pp. A19, A22), neither individual explained conflict of interest to petitioner (Fdg. 21, p. A22), neither explained to him that he had rights to the assistance of counsel untainted by prior loyalties to a conflicting interest (*ibid.*), and petitioner did not in fact learn anything about conflict of interest until he was returned to this country as a prisoner after his trial (Fdg. 25, pp. A24-A25). In those circumstances, plainly, there was no understanding waiver of his constitutional rights. *Emspak* v. *United States*, 349 U.S. 190, 198; *Von Moltke* v. *Gillies*, 332 U.S. 708; *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

6. The net of the foregoing is that the ruling of the court below on the first substantive constitutional issue is at variance with every right-to-counsel case decided in this Court for over twenty years. It should therefore not be permitted to stand without further review.

Fourth. Following his trial by court-martial, petitioner was denied due process of law in violation of the Fifth Amendment, because, prior to the hearing before the Judicial Council, his appellate counsel was denied access both to the staff judge advocate's review and to the opinion of the Board of Review.

The Articles of War then in effect provided for automatic appellate review, both by the convening authority's staff judge advocate, then by a Board of Review, and finally, since an officer was involved, by the Judicial Council and The Judge Advocate General. AW 47, AW 48, AW 49, AW 50.

The review of the staff judge advocate was required by law to be made (AW 47(c); MCM, ¶87*c*), and it was in fact made (Fdg. 22, pp. A22-A23). Since an officer was

involved, the case had first to be examined by a Board of Review (AW 50(d)(2), *infra*, p. A30; MCM, ¶96*b*); it was in fact so examined (Fdgs. 26-27, p. A25), and an opinion written, as required by AW 50(d).

The further travel of the case depended on the Board's holding. If the Board held the record of trial legally sufficient, the case went to the Judicial Council (AW 50(d)(2)). If the Board found the record legally insufficient, it was required to submit its holding to The Judge Advocate General (AW 50(d)(3), *infra*, p. A30). If that officer concurred, that disposed of the case (*ibid.*). But if he did not concur in the Board's holding of insufficiency, then its holding was transmitted to the Judicial Council under AW 50(d)(4), *infra*, p. A31.

Therefore, once petitioner's appellate counsel had been advised of the hearing before the Judicial Council, there necessarily had been a holding of legal sufficiency, either by the Board or by The Judge Advocate General—but until counsel could see the Board's opinion, he would not know who had held what or which paragraph of AW 50(d) was applicable.

Petitioner's counsel was accorded a hearing and the right to file briefs before the Judicial Council; this was not a matter of grace, but was specifically accorded by MCM, ¶99, *infra*, p. A36. But he was denied the right to see either the staff judge advocate's review or the opinion of the Board of Review, although neither document was ever classified for security reasons, and although the latter now appears on open library shelves (Fdgs. 26-27, p. A25).

The foregoing facts establish a denial of due process.

1. Since appellate review was required by law, it follows that the proceedings before the several appellate tribunals that successively reviewed the findings and sentence of the court-martial before which petitioner was

tried are part of that process of law by which his conviction must be tested. *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Frank* v. *Mangum*, 237 U.S. 309, 327.

2. True, petitioner's counsel had a hearing before the Judicial Council (Fdg. 28, p. A26). But the right to be heard, standing alone, is not enough. As Chief Justice Hughes said in *Morgan* v. *United States*, 304 U.S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

Here petitioner's counsel, having been denied the right to see the rulings under review, was unable "to know the claims of the opposing party." He was denied equal access to the file, a denial which, as this Court held in *Gonzales* v. *United States*, 348 U.S. 407, involves a deprivation of due process of law. As was there said (pp. 414, 415), "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions. * * * Just as the right to a hearing means the right to a meaningful hearing, * * * so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered."

Tested by the foregoing standards, it is plain that, by requiring petitioner to proceed in ignorance of unclassified documents required by law to be made, he was denied an essential ingredient of due process of law in the appellate review of his conviction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
Suite 815, Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.

Counsel for the Petitioner.

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